Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Jurisdictional Separations and Referral To the Federal-State Joint Board	)	CC Docket No. 80-286
	)	
Petition by Terral Telephone Company, Inc. For Waiver of 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 to Unfreeze Part 36 Category Relationships	)	

To: Chief, Wireline Competition Bureau

PETITION OF TERRAL TELEPHONE COMPANY, INC. FOR WAIVER OF 47 C.F.R. SECTIONS 36.3, 36.123-126, 36.141, 36.152-157, 36.191 AND 36.372-382 TO UNFREEZE PART 36 CATEGORY RELATIONSHIPS

Pursuant to Section 1.3 of the rules of the Federal Communications Commission ("FCC" or "Commission"),[1] Terral Telephone Company, Inc. ("Terral" or the "Company") hereby requests a permanent waiver of 47 C.F.R. Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191 and 36.372-382 (hereinafter referred to as "Frozen Category Rules") as these rules relate to frozen category relationships entirely removing the category freeze for Terral. Waiver of these rules would allow Terral to properly allocate its costs enabling the Company to receive the appropriate cost-based settlements while lessening the burden on the high cost fund. As demonstrated herein, grant of this waiver is warranted due to the fact that the "good cause" waiver standard has been satisfied, and grant of this waiver would be in the public interest.

I. Background

Terral's study area is located in Jefferson County, Oklahoma, in the southern portion of Oklahoma on the Oklahoma -Texas border. Total population in Jefferson County as of

2010 was 6,472, a 5.1% decline since the 2000 census.[1] Jefferson County is a rural area encompassing 759 square miles and, based on 2010 census results, has 8.5 persons per square mile.[2] Nearly 20% of the residents of Jefferson County are age 65 or older and 6.2% of its residents are Native American.[3] Additionally, approximately 16.7% of Jefferson county residents live below the poverty level and 26% of Jefferson County residents are Medicaid recipients. Jefferson County only had 111 nonfarm establishments in 2009 and only 11% of its residents are employed by nonfarm establishments.[4]

There are eight (8) rural communities located in Jefferson County, with the town of Waurika having the largest population of 1,988 residents, or nearly 31% of the total population of Jefferson County. Waurika is not in Terral's study area. Rather, Terral's study area is located in the southern tip of Jefferson County where there is only the single community of Terral with an estimated population of 353 in 2009 and approximately 173 households.[5] The median income for a household in the town of Terral was $15,972, and the median income for a family was $21,563.[6] Males had a median income of $20,893 versus $18,750 for females.[7] The per capita income for the town of Terral was $9,486. About 24.5% of families and 27.7% of the population were below the poverty line, including 40.4% of those under age 18 and 26.6% of those aged 65 or over.[8] In short, the demographic makeup of Terral's customers are elderly and low income citizens.

Terral's study area encompasses 86 square miles in the southern portion of Jefferson County, Oklahoma. Terral has installed approximately [redacted] route miles of copper and fiber

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[1] U.S. Census Bureau, Quickfacts, Jefferson County, Oklahoma
[2] Id.
[3] *Id.*
[4] Id.
[5] U.S. Census Bureau, Annual Estimates of the Resident Population for Incorporated Places In Oklahoma: April 1, 2000 to July 1, 2009.
[6] Id.
[7] Id.
[8] Id.

telephone facilities to satisfy its carrier of last resort and minimum service quality obligations imposed by the Oklahoma Corporation Commission. Based on its end-of-year 2011 access lines in service, Terral serves [redacted] access lines per square mile and approximately [redacted] customers per route mile. Terral's study area consists of a single exchange with one rural community. When all of the households in the town of Terral are removed, Terral serves approximately [redacted] customers per mile in rural areas of the County. Terral's service area can best be described as rural agricultural land with only one small community.

Terral is required to construct and maintain a high quality wireline network to comply with Oklahoma Corporation Commission ("OCC") rules and Rural Utilities Service ("RUS") requirements. Specifically, the OCC has designated Terral as the carrier of last resort in its service territory and therefore, must provide service to all requests for service to locations within one-quarter mile from its facilities, without additional construction charges.[9] The OCC also requires that Terral must furnish single party service with advanced calling features, access to 911 and the capability of accessing the Internet at minimum speeds of 56kbps.[10] Despite OCC minimum service requirements, Terral has constructed and maintained its copper and fiber optic network such that it can offer voice services to its customers that are reasonably comparable to services that are available to urban customers. Terral provides broadband services via Wireless Internet Service Protocol (WISP) network. Terral has deployed state of the art telephone facilities in the most efficient manner available at the time of their deployment. In addition, Terral has constructed and managed its network with attention to limited essential staff to respond to emergencies, bill services and respond to customers.

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[9] OAC 165:55-13-12.

[10] OAC 165:55-13-10.

Due to the high cost to meet state carrier of last resort and minimum service obligations and to offer its customers reliable voice service and broadband service, Terral has borrowed from the Rural Utilities Service ("RUS") of the United Stated Department of Agriculture in order to finance the construction and maintenance of its network. [redacted]. Without the waiver to unfreeze its categories, roughly [redacted] of the new broadband facilities will remain recovered through USF High Cost Loop and ICLS and end user common line charges, rather than through interstate special access. With the waiver Terral will receive the appropriate cost-based settlements while lessening the burden on the high cost fund.

The anticipated reduction of universal support to Terral due to the USF/ICC reform is projected to cause significant financial harm to Terral. The financial harm to Terral will cause it to default on its RUS note and fail to have adequate cashflow to continue to provide voice service to residents in its service area. This waiver to unfreeze its categories is necessary in its overall plan to move its costs from support mechanisms to special access.

There are no wireline competitive alternatives for Terral's customer base if Terral becomes unable to continue to provide voice service. In addition, wireless alternatives are sparse and provide low to moderate coverage in Terral's service area. As a result, should the federal universal service reforms be applied to Terral without waiver, and without approval of the present waiver request, voice service to residents in the southern tip of Jefferson County, Oklahoma will be severely threatened and will likely cease to be available.

II. Waiver Standard

In general, the Commission may waive its rules for good cause shown.[11] Good cause, in turn, may be found and a waiver granted "where particular facts would make strict compliance inconsistent with the public interest."[12] To make this public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.[13]

The Commission may exercise its discretion to waive a rule when the particular facts make strict compliance inconsistent with the public interest.[14] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[15] In short, a waiver is justified when special circumstances warrant a deviation from general rules and such deviation will serve the

[11] 47 C.F.R. § 1.3. *See also ICA Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (D.C. Cir. 2005) ("*ICA Global Communications*"); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)("*Northeast Cellular*"); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)("*WAIT Radio*").
[12] *Northeast Cellular* at 1166; see also *ICO Global Communications* at 269 (quoting Northeast Cellular); *WAIT Radio* at 1157-1159.
[13] See, e.g., *WAIT Radio* at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule); *Northeast Cellular* at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).
[14] The Commission has considerable discretion as to whether to waive its rules. *See Office of Communication of United Church of Christ v. FCC*, 91 F.2d 803, 812 (D.C. Cir 1990) (upholding the Commission's grant of a waiver "[g]iven the deference due the agency in matters of this sort"); *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir 1984)(noting that the scope of review of a waiver determination by the Commission "is narrow and constrained"). As the D.C. Circuit has observed, the Commission's waiver determinations are entitled to heightened deference because "the agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety-valve procedure for consideration of an application for exemption based on special circumstances." *AT&T Wireless Services, Inc. v. AT&T*, 270 F.3d 959, 965 (D.C. Cir 2001) (internal quotation marks omitted).
[15] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F2d 1164, 1166 (D.C. Cir. 1990).

public interest.[16]

III. Waiver is Justified

A. Terral Invested with the Expectation that the Freeze Would End in the Five-Year Time Period Specified by the FCC

In 2001, the FCC required all rate-of-return carriers to freeze their allocation factors and allowed these carriers the option of freezing their category relationships.[17] When the Company made its election to freeze its categories, it did not anticipate that the freeze would last for such an extended period of time. Initially, the freeze was set to expire on June 30, 2006 or until the Commission completed comprehensive separations reform whichever came first.[18] Based upon this understanding, Terral notified the National Exchange Carrier Association ("NECA") of its election to freeze its category relationships "during the period of July 1, 2001 through June 30, 2006." In 2006, however, the FCC extended the freeze for three years or until the Commission completed comprehensive separations reform whichever came first[19] and then continued to extend the freeze for one year intervals with the most recent decision extending the freeze until June 30, 2012.[20]

During that time, Terral has implemented high capacity services, to the extent that approximately [redacted] of its inter-office facilities are related to high capacity, special access

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[16] *Northeast Cellular*, 897 F.2d at 1166; *see also Allband Communications Cooperative, Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, WC Docket No. 05-174, Order, 2005 FCC LEXIS 4527 (Aug. 11, 2005).

[17] *See Jurisdictional Searations and Referral to the Federal-State Joint Board, CC Docket No. 80-286*, Report and Order, 16 FCC Rcd 11382 (2001) ("*2001 Separations Freeze Order*"). Category relationships are "the percentages of a carrier's costs for equipment and investment, recorded in Part 32 accounts, that are assigned to various Part 36 categories based on how the equipment or investment in that category is being used." *In the Matter of Petition by Gila River Telecommunications, Inc. Pursuant to 47 C.F.R. Sections 36.3, 36.123-126, 36.152-157, and 36.372-382 for Commission Approval to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286, Order, FCC 10-199 (rel. Dec. 2, 2010) at n. 7.

[18] *See 2001 Separations Freeze Order* at para 9.

[19] *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, 5523, para. 16 (2006).

[20] *See Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC docket No. 80-286, Report and Order, FCC 09-44 (rel. May 15, 2009) ("*2009 Separations Freeze Extension Order*"); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, FCC 10-89 (rel. May 25, 2010); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, FCC 11-71 (rel. May 4, 2011).

transport. Under the frozen factor allocation, roughly [redacted] of inter-office Cable & Wire Facilities is allocated to wideband. As a result, a considerable amount of wideband cost is being recovered, inappropriately, through state and interstate switched access, end user common line charges as well as USF High Cost Loop and ICLS settlements.

Terral has also applied for an RUS loan to deploy broadband services throughout its serving area. However, the current freeze in Terral's categorical cost relationship will mis-allocate costs for broadband recovery. The estimated $[redacted] in capital expenditures reflects [redacted]. [redacted]. With the freeze in effect, a majority of these costs would be recovered through both USF High Cost Loop and USF Interstate Common Line Settlements. This, too, would represent a misallocation of costs, and cost recovery, due to the freeze. The anticipated reduction of universal support to Terral due to the USF/ICC reform is projected to cause significant financial harm to Terral. This waiver to unfreeze its categories is necessary in its overall

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21 [redacted]

plan to move its costs from support mechanisms to special access and which will more accurately reflect actual plant data and reduce the adverse impact of the USF/ICC reform on Terral.

Lastly, the FCC has stated the factor freeze would benefit incumbent LEC's, since they would have reduced overhead attributable to calculating the factors for cost study purposes. However, well over half the cost in developing these factors is derived from continuing property records, switched and special circuit inventories and network diagrams, which are still required to be maintained by Terral. Therefore, the freeze hasn't resulted in these cost savings or the difficulty in maintaining such records. Were Terral to have its categorical relationships unfrozen, the same processes in keeping track of these costs would continue, not burdening Terral with additional costs and difficulties.

B. Allowing Terral to Unfreeze Categories Under These Circumstances Constitutes "Good Cause" and is in the Public Interest

While making these investments, Terral has been unable to properly assign its costs related to broadband deployment due to the Frozen Category Rules. In its *2009 Separations Freeze Extension Order*, the FCC recognized that companies such as Terral may have made their decision for "administrative convenience, expecting that when they were ready to undertake new investment after the end of the five-year freeze, they would be allowed to allocate the investment to the appropriate categories."[22] Believing this to be a matter that should be addressed, the FCC asked the Federal-State Joint Board on Jurisdictional Separations ("Joint Board on Separations" or "Board") to consider "whether allowing carriers a one-time opportunity to freeze or unfreeze category relationships is warranted under the

[22] *2009 Separations Freeze Extension Order* at para. 19.

circumstances."[23] Based on this directive, on March 5, 2010, the state members of the Joint Board on Separations submitted a proposal to the Board recommending an interim adjustment of separations allocation factors and category relationships pending comprehensive reform.[24] Part I of the Proposal addressed the "cost-revenue mismatch" for carriers that have frozen their category relationships due to the fact that these carriers "have not directly assigned their interstate special access investment during the freeze."[25] According to the Proposal, the cost studies on which the category relationships were based "is governed by separations studies that are nine years old" which "are unlikely to reflect current conditions" and thus "no longer have any basis in fact."[26] The Proposal then declares, "[w]hile some inaccuracy of the separations process is permissible, currently the actual use to which the property is put is almost completely ignored [which] is contrary to the Supreme Court's instructions in *Smith v. Illinois*."[27] As further explained in the Proposal,

> Companies' use of the same frozen categorization percentages that they used in 2001, regardless of the actual uses of their current plant, is not sufficient to properly separate costs between jurisdictions. . . . We believe that the freeze and the FCC staff directive to ignore direct assignment rules have led to a mis-assignment of special access costs. This mis- assignment is created by the growth in interstate special access lines and revenues over time without a commensurate growth in interstate assignment of costs. This mis-assignment is accentuated by the fact that much of the revenue benefit due to the growth in the number of special access circuits would have been allocated to the interstate jurisdiction given the FCC's assertion of jurisdiction over certain exchange special access lines with even minimal levels of interstate traffic. In contrast the associated special access costs under the freeze would in large part have been allocated to the state jurisdiction at the same relative level as before the freeze.[28]

[23] *Id.*
[24] *See* Letter from Steve Kolbeck, State Chairman, Federal-State Joint Board on Jurisdictional Separations, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 80-286 (Mar. 5, 2010)("Proposal").
[25] *Id.* at p. 5.
[26] Proposal at 2-3.
[27] *Id.* at 3 citing *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930).
[28] *Id.* at 5-6.

Although to date, no action has been taken on the Proposal, it is evident that both the FCC and the Board believe it is important that the cost-revenue mismatch caused by the freeze of category relationships be addressed. Grant of this waiver would be a step in that direction in that it would allow Terral to properly allocate its costs enabling the Company to receive additional cost-based settlements without in any way burdening the high-cost fund.[29]

1. The Company Would Receive Additional Cost-Based Settlements Without Burdening the High-Cost Fund

Specifically, grant of this waiver would allow Terral to appropriately allocate its costs to the interstate jurisdiction which would allow the Company to receive additional cost-based settlements that would come from interstate pool settlements – not from the high-cost loop fund. Accordingly, grant of this waiver will lessen the burden on the high-cost loop fund.

To illustrate, as shown in Section II of Attachment 2, based on 2011 cost data, Terral estimates that if the FCC grants this instant waiver request, the proportion of net investment allocated to the intrastate jurisdiction would decrease while net investment allocated to the interstate jurisdiction would increase resulting in a shift of approximately [redacted] percent of net investment to interstate. Similarly, Terral estimates that the proportion of expenses allocated to the intrastate jurisdiction would decrease while expenses allocated to the interstate jurisdiction would increase resulting in a shift of approximately [redacted] percent to interstate. As shown in Section I of Attachment 2, this shift in cost allocation would result in the Company receiving $[redacted] in high-cost loop support and ICLS, annually. The same attachment also reflects a shift of $[redacted] in

[29] The majority of Terral's costs which have been mis-allocated are cable & wire facilities.

additional cost-based annual pooling settlements.[30] Section II of Attachment 2 reflects jurisdictional shift from lifting the freeze for net investment and operating expenses. The current freeze is misallocating $[redacted] of net investment and $[redacted] of operating expenses to the intrastate jurisdiction. Attachment 3 details this misallocation further by looking at the detailed jurisdictional allocation of Central Office Equipment and Cable & Wire Facilities, with and without the freeze.

Attachment 4 and 5 provide the same calculations, estimating 2012 costs by utilizing 2011 and adding $[redacted] in new investment associated with Terral's RUS Loan, in order to capture the misallocation of the freeze with the new investments for 2012. Section II of Attachment 4 reflects [redacted] of net investment and [redacted] of operating expenses is being misallocated to intrastate due to the current freeze of categorical relationships. As shown in Section 1 of Attachment 4, lifting the freeze and reallocating costs would reflect in $[redacted] HCL and ICLS, combined and $[redacted] interstate traffic sensitive settlements. Attachment 5, like Attachment 3, shows the detailed Central Office Equipment and Cable & Wire Facilities jurisdictional misallocation detail associated with the current freeze.

2. The Additional Settlements Would Be Used to Expand and Enhance Broadband Offerings

Terral will use the additional cost-based settlements to reduce the $[redacted] debt that has already been incurred which was used to deploy state of art voice service throughout the Company's rural service territory. Additionally, Terral will use the additional settlements to continue expanding its network and enhancing broadband service to its subscribers. [redacted]

[30] See Attachment 3 using 2011 cost data to illustrate that costs related to cable & wire facilities are the primary driver for the shift in costs to interstate if the FCC were to grant this waiver allowing Terral to unfreeze its categories.

[redacted]. [redacted] For example, the Company already provides copper and fiber facilities to cell towers enabling wireless carriers to provide service in this rural portion of Oklahoma.

C. Costs Are Not Being Recovered from the State Universal Service Fund

As explained above, due to the operation of the Frozen Category Rules, costs that should have been allocated to the interstate jurisdiction instead have been allocated to the state jurisdiction. As explained below, for Terral, these mis-assigned costs are not recovered from the Oklahoma Universal Service Fund.

In 1996, the Oklahoma Corporation Commission established its High Cost Fund ("HCF") pursuant to Order No. 399040. Among other things, Order No. 399040 established intraLATA access charges for Terral and other rural LECS operating in Oklahoma and established a fixed subsidy mechanism for rural LECs based on intrastate allocated interexchange expenses and investment revenue requirement adjusted to reflect a 10.823% rate of return on net investment. The HCF has been operating pursuant to Commission Order No. 399040 and largely unchanged since its establishment by the Commission in 1996. However, the Commission is currently investigating issues pertaining to the HCF, including the elimination of the HCF in its entirety.

Grant of this waiver would allow proper allocation allowing Terral to recover these costs from interstate pool settlements and decrease the burden on USF.

IV. Conclusion

As demonstrated herein, "good cause" exists for grant of this waiver and grant would advance the public interest. Specifically, grant of this waiver would allow Terral to properly allocate its costs enabling the Company to receive additional cost-based settlements while lessening the burden on the high-cost fund. The additional settlements would be used by Terral to reduce the debt which it incurred in order to provide robust broadband to the Company's rural subscribers as well as continue expanding its network and enhancing broadband service to its subscribers, anchor institutions and other providers that rely on its network.

Respectfully Submitted,

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ATTACHMENT 1

REDACTED – FOR PUBLIC INSPECTION

Service Territory Map

ATTACHMENT 2

ATTACHMENT 3

ATTACHMENT 4

ATTACHMENT 5